No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUILDING COMPANY,
A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINIONS BELOW

The memorandum opinion of the District Court (R. 178–185) is reported at 97 F. Supp. 595. The opinion of the Court of Appeals (R. 206–224) is reported at 199 F. 2d 12.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1952. (R. 225.) A petition for a writ of certiorari was filed on December 17, 1952, and was granted on February 2, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

The Commissioner assessed deficiencies against the taxpayer for the taxable years 1933, 1938, and 1939, determining that the taxpayer had claimed an excessive value as its basis for depreciating certain property. The taxpayer filed petitions for redetermination by the Tax Court of these deficiencies. Without further proceedings, the Commissioner and the taxpayer filed stipulations in the Tax Court that there were no deficiencies for the years in question. No facts were stipulated, no hearings were held, and no issues of fact or law were presented to or decided by the Tax Court, which, pursuant to the stipulations, entered formal decisions that there were no deficiencies for those years.

The question presented is whether these decisions, on the principle of *res judicata* or estoppel by judgment, preclude the Government from showing in a subsequent suit by the taxpayer involving later taxable years that the proper basis, for depreciation and other purposes, of taxpayer's property is lower than the basis claimed in the taxpayer's petitions in the prior proceedings.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set forth in Appendix A, *infra*, pp. 34–38.

STATEMENT

This action was brought by the respondent corporation (the taxpayer) to recover deficiency

assessments paid for the years 1943, 1944, and 1945. (R. 31.) The only disputed item still material in this proceeding is the basis to the taxpayer of a leasehold and 17-story building owned by it.

The taxpayer is a corporation organized under the laws of the State of Missouri on April 14, 1913. (R. 34.) In return for all of its securities—bonds in the face amount of $300,000 and 6,000 shares of stock with a par value of $50 each—the taxpayer on May 1, 1913, acquired a leasehold expiring December 31, 2004, of a plot of ground together with an office building erected thereon by the lessee. (R. 34, 36.)

From its acquisition of the property on May 1, 1913, until December 31, 1919, the taxpayer claimed no depreciation in its tax returns. From 1920, after the present owner acquired control, through 1942, the taxpayer claimed total depreciation deductions of $412,848.92. The basis used for depreciation from 1920 through 1939 was $860,000; subsequent to 1939, the figure was raised to $870,383. (R. 38–39, 42.) The correctness of this basis is the source of this controversy.

While the basis claimed by the taxpayer had been questioned previously,[1] it was not until

[1] In 1926 the depreciable basis claimed by the taxpayer on its returns for 1920 and 1921 was questioned. However, the revenue agent in charge, under a mistaken impression of the applicable law (R. 118), allowed the basis claimed upon proof purporting to show that the building had been transferred in July 1907 for a consideration of $714,000, and that

January 1942 that the Commissioner disallowed the basis and assessed deficiencies for 1933, 1938 and 1939, totalling $2,750.37. (R. 52–53.) This was predicated on a basis of $385,000 amortized over the life of the lease. (R. 44, 45.) The taxpayer filed two petitions for review with the Board of Tax Appeals (now the Tax Court), alleging that it had invested $860,000 in the building. Of this amount, $600,000 was claimed as the 1913 value of the securities given as consideration for the property. To this was added a further $260,000 for alleged expenses incurred primarily in completing the top eleven floors of the building after May 1913. The total was amortized over a 45-year period. (R. 45.)

In November 1941 the taxpayer filed a petition under Chapter X of the Federal Bankruptcy Act in the United States District Court for the Eastern District of Missouri. (R. 45.) The local Collector of Internal Revenue filed proof in this proceeding of claim for deficiencies in taxes for 1933, 1938 and 1939, along with a claim for additional taxes for 1941, totalling in all $4,883.24. (R. 45, 50.)

On October 7, 1944, the District Court issued an order confirming the taxpayer's plan for re-

between 1907 and 1913 $165,000 had been spent to complete the top eleven floors. (R. 116–17.) In 1929, when the taxpayer's return was again questioned (R. 122–31), the claimed basis of $860,000 was approved without further examination as "having been substantiated in prior examinations." (R. 130.)

organization. (R. 45–46.) On the same date the Government filed a stipulation in the bankruptcy proceedings withdrawing its claim. (R. 46, 50–51.) This stipulation provided, in part (R. 51):

> It is * * * Stipulated and Agreed by and between the parties hereto that the withdrawal of said Amended Claim by the United States is without prejudice and does not constitute a determination of the merits and does not prejudice the rights or remedies of the United States for the collection of Internal Revenue taxes that may be due with respect to any year other than those involved in said Amended Claim, namely, the years of 1933, 1938, 1939 and 1941.

Four days later, on October 11, 1944, the taxpayer and the Commissioner filed stipulations in the then pending Tax Court proceedings that there were no deficiencies for the years 1933, 1938, and 1939. (R. 46, 51–52, 54.) The Tax Court held no hearing; there was no argument; no stipulations of facts were entered into; and no briefs were filed. (R. 46.) On October 17, 1944, pursuant to the stipulations, the Tax Court entered formal decisions that there were no deficiencies in income taxes for 1933, 1938, and 1939. (R. 46, 52, 54.)[2]

[2] The stipulation filed in the proceeding involving the year 1933 were as follows (R. 51–52):

STIPULATION

It is hereby stipulated that there is no deficiency in

Four years later, on July 20, 1948, the Commissioner assessed deficiencies in the taxpayer's income and excess profits taxes for the years 1943, 1944, and 1945, totalling $16,297.96. (R. 178.) These assessments form the basis of the present action. The only issue still material in this proceeding is the validity of these assessments in so far as they rest on the Commissioner's reductions in the basis reported by the taxpayer in its property.[3]

Federal income tax due from the petitioner for the taxable year 1933 and that the following statement shows the petitioner's Federal income tax liability for the taxable year 1933:

Tax liability	None
Assessment (Jeopardy): January 23, 1942 (not paid)	$2,188.12
Assessment to be abated	2,188.12

The decision entered thereon read (R. 52):

DECISION

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on October 11, 1944, it is

Ordered and Decided: That there is no deficiency in income tax for the calendar year 1933.

J. E. MURDOCK,
Judge.

The stipulation filed in the other proceeding (R. 53) and the decision entered thereon (R. 54) are identical except for the differences in the years and in the amounts involved.

[3] In its complaint the taxpayer challenged the disallowance by the Commissioner of deductions in 1943 and 1945 for capital stock taxes (R. 6, 17), and a deduction in 1945 for professional fees in connection with its reorganization proceeding (R. 17). However, the first of these claims was

The basis used by the taxpayer in its returns for the years in question is $870,383. This is the same basis claimed for 1933, 1938 and 1939, except for the addition of a $10,383 local improvement assessment, as to which there is no dispute. (R. 40.) The Commissioner determined the taxpayer's basis to be $430,000. (R. 42–44.) Since allowed and allowable deductions prior to January 1, 1943, had exceeded this sum by $31,000 (R. 42), the Commissioner disallowed the deductions taken for depreciation subsequent to that date (R. 32). The disallowance of the deductions for depreciation converted the net operating loss reported for 1943 and 1944 into a profit and, consequently, eliminated the net operating loss carry-over reported by the taxpayer in 1945. (R. 32–34). Accordingly, the Commissioner also disallowed this deduction. The disallowance of these deductions for depreciation and for net operating loss carry-over is primarily responsible for the assessed deficiencies in the taxpayer's income taxes.

The reduction in the taxpayer's basis also revised the equity invested capital on which it had computed its excess profits taxes and gave rise to the deficiency in those taxes.

In this proceeding to recover the income and excess profits taxes paid on the deficiencies

withdrawn by the taxpayer in the District Court. (R. 186–187.) The second was decided against the taxpayer in both courts below (R. 184–185; 224), and no question as to it is raised in this Court.

assessed by the Commissioner, the taxpayer alleged that it had acquired the building for securities whose value was $600,000, $300,000 in stock and $300,000 in bonds, that it had thereafter invested $260,000, primarily in finishing the top eleven floors of the building, and that after 1939 it had made other capital expenditures of $10,383, giving it a total basis for depreciation of $870,383. (R. 2–5.) The taxpayer further pleaded that the prior decisions of the Tax Court were *res judicata* of the fact that its basis is $860,000.

The district court, agreeing with the Commissioner, held that the taxpayer's basis in its property as of May 13, 1913, was not in excess of $430,000. (R. 188.) The court further found, as a fact, that the building had been "fully completed and finished by May 1, 1913." (R. 187.)

The district court also rejected the taxpayer's contention (R. 7–8, 15–16, 46) that the Tax Court's decisions pursuant to stipulation of "no deficiency" for the years 1933, 1938, and 1939 estopped the Commissioner from asserting that the basis for depreciation was less than $860,000. Pointing out that the Tax Court's decisions had been entered without hearings, that no facts had been presented, by stipulation or otherwise (R. 179–180), that, in short, "there were no issues presented for the [Tax] Court to decide" (R. 180), the district court concluded that the Tax Court decisions were "nothing more than an

order confirming an agreement of counsel. There was no decision on any fact or issue." (R. 180.)

On appeal, the court below found no error in the district court's findings on the merits (R. 211), but reversed the decision on the issue of *res judicata*. It held that in stipulating for the prior Tax Court decisions the parties had "threshed out the facts" and "agreed upon the basis for depreciation." (R. 223.) It concluded that the stipulated decisions of the Tax Court established for all subsequent years the taxpayer's basis of its property and precluded litigation of that issue in the present suit. (R. 218, 223–224.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred in holding that the decisions of the Tax Court that there were no deficiencies in the taxpayer's taxes for the years involved in proceedings then pending before it, based solely upon the stipulations of the parties to that effect, preclude the Government, under the doctrine of collateral estoppel, from showing in a subsequent suit by the taxpayer, for recovery of deficiency taxes paid for later years, that the taxpayer's basis in certain property is lower than was claimed in the taxpayer's petitions in the prior proceedings.

SUMMARY OF ARGUMENT

This proceeding involves the effect of a judgment as an estoppel in a subsequent action be-

tween the same parties upon a different claim or demand. In reliance upon the principle of *res judicata* or collateral estoppel the court below held that the Government was concluded in this action from denying that the taxpayer's basis in certain property was $860,000. This issue, the court concluded, had been made *res judicata* by two earlier decisions of the Tax Court, entered upon stipulations between the parties of "no deficiency," in proceedings involving income taxes for earlier years. The taxpayer in the petitions initiating the proceedings in the earlier years had alleged its basis to be that amount. In those proceedings no evidence was received, no stipulations of facts entered, no briefs filed, no hearing held, and no arguments made upon any issues of fact or law. Thousands of cases in the Tax Court have been and continue to be settled by such stipulated decisions.

The decision below is in square conflict with the decision of the Court of Appeals for the Tenth Circuit in *Trapp* v. *United States*, 177 F. 2d 1, certiorari denied, 339 U. S. 913, which held that decisions of the Tax Court of the character here involved will not support a plea of estoppel. Since such decisions involve no judicial determination of any litigated right, the considerations of policy underlying the doctrine of collateral estoppel have no application to them and they should not foreclose inquiry into the merits.

In so far as the decision below finds the Government concluded as to an issue which might have been litigated and determined, had the matter been allowed to proceed to judgment on the merits, but which was not in fact so determined, it departs from well-established principles governing application of the doctrine of collateral estoppel. These principles have been repeatedly applied in tax cases. There is no support for the lower court's conclusion that the parties had agreed in the prior proceedings as to the taxpayer's basis. Since this issue was not canvassed or determined in the prior proceedings, it was not concluded in this action.

ARGUMENT

A DETERMINATION ON THE MERITS OF THIS ACTION IS NOT BARRED, UNDER THE PRINCIPLE OF RES JUDICATA OR COLLATERAL ESTOPPEL, BY THE DECISIONS OF THE TAX COURT IN THE PRIOR PROCEEDINGS INVOLVING EARLIER TAX YEARS

Subsumed under the heading *res judicata* are two distinct principles with different historical roots: the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. *Commissioner* v. *Sunnen*, 333 U. S. 591; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Tait* v. *Western*

Md. Ry. Co., 289 U. S. 620.[4] It is the second and far narrower principle, called variously estoppel by judgment or collateral estoppel, which is here involved.

In *Commissioner* v. *Sunnen, supra,* pp. 597–598, this Court analyzed and defined the scope of *res judicata* and collateral estoppel as applied to federal tax litigation, as follows:

> * * * The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac,* 94 U. S. 351, 352.

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[4] See also, Griswold, *Res Judicata in Federal Tax Cases,* 46 Yale L. J. 1320 (1937); *Res Judicata in Federal Taxation,* Paul, *Selected Studies in Federal Taxation* (2d Series, 1938) 104; Scott, *Collateral Estoppel by Judgment,* 56 Harv. L. Rev. 1 (1942); *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 840–850 (1952); *Restatement of the Law of Judgments,* Secs. 68, 69, 70. And see Millar, *The Historical Relation of Estoppel by Record to Res Judicata,* 35 Ill. L. Rev. 41 (1940).

The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata," 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48.

But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell* v. *County of Sac, supra,* 353. And see *Russell* v. *Place,* 94 U. S. 606; *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a mat-

ter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, §§ 68, 69, 70; Scott, "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1.

These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.

In reliance upon the principle of collateral estoppel, the court below held that the Government was concluded in an action involving income and excess profit taxes for 1943, 1944 and 1945 from denying that the taxpayer's basis in certain property was $860,000. This issue, the court held, had been conclusively determined by two

decisions of the Tax Court, entered upon stipulations between the parties of "no deficiency," in earlier proceedings, involving income taxes for the years 1933, 1938 and 1939, in which the taxpayer in the petitions initiating the proceedings had alleged its basis to be that amount. In those proceedings, no evidence was received, no stipulations of facts entered, no briefs filed, no hearings held, and no arguments made upon any of the issues. In effect, the decision below extends the doctrine of collateral estoppel to embrace every issue which would have been determined by the Tax Court had these proceedings been allowed to proceed to judgment on the merits and not been disposed of upon the stipulation of the parties.

Since 1925 almost two-thirds of the litigation in the Tax Court has been settled by stipulation.[6] Because of the fact that the dismissal of a proceeding pending in the Tax Court is, in effect, a

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[5] For stipulated decisions of the type involved here, the Tax Court employs a standard form which requires only that the case number, the names of the parties, and the stipulated deficiency, if any, be entered. See Appendix B, *infra*.

[6] In the years from 1925 through November 30, 1952, out of 151,390 cases closed, 94,293 were settled by stipulation. For the fiscal year ending June 30, 1952, the figures were 3,326 stipulated in a total of 4,975; for the year ending June 30, 1951, 3,364 out of a total of 5,055; and for the year ending June 30, 1950, 2,732 out of 4,125.

decision against the taxpayer[7] a judgment entered on stipulation is the only procedure by which a pending action can be settled on the basis of either no deficiency or a deficiency different from the one originally determined. Both the Bureau of Internal Revenue and the Tax Court (see p. 21, *infra*) have consistently assumed that decisions entered on stipulation—at least where no underlying factual or legal contentions were presented to the court for resolution—affect only the particular taxable years involved, and preclude neither party from litigating, as to future tax years, issues which might have been, but were not, actually litigated in the cases settled by stipulation. Under the decision below, however, the thousands of cases so settled become conclusive adjudications of the truth of the allegations in the petitions which initiated them.

The district court found here that the value for depreciation purposes of taxpayer's property on May 1, 1913, was not in excess of $430,000 (R. 187), and the court below has sustained that finding (R. 211).[8] Yet because the Government

[7] Section 1117 (d) of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 1117), provides that "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner."

[8] In view of the fact that the district court held, on the merits, that the Commissioner had properly determined the taxpayers' basis in its property (R. 188), and that the Court of Appeals, from its examination of the entire record, found no error in this conclusion (R. 211), it is assumed that this

agreed in 1944, when this taxpayer was engaged in a reorganization proceeding, to relinquish a claim for taxes for three years amounting to less than $3,000, the taxpayer now has a vested right,

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Court will not reexamine the concurrent findings of the two lower courts that the taxpayer's basis in its property did not exceed $430,000. *Allen* v. *Trust Co.*, 326 U. S. 630, 636; *United States* v. *O'Donnell*, 303 U. S. 501, 508. In any event, examination of the record would confirm such findings.

The taxpayer's basis in its property is its cost, plus, for purposes of depreciation, any expenditures chargeable to capital account. Internal Revenue Code, Secs. 113, 114, 718. (Appendix A; *infra*, pp. 34–37.) The basis alleged in the complaint, $870,383, rested on an alleged cost of acquisition of $600,000, on capital expenditures before 1920, amounting to $260,000, primarily for finishing the top eleven floors of the building, and on a capital expense after 1939 of $10,383. (R. 2–5.)

No attempt was made by the taxpayer in the district court to prove the claimed investment in completing the top eleven floors of the building and, in the court below, the taxpayer acknowledged that "it was definitely shown at the trial of the cause that the top eleven floors were finished before May 1, 1913". The trial court found as a fact that the building was fully completed when the taxpayer acquired it. (R. 187.) As to the other claimed capital expenditures, it was conceded prior to trial that, with the exception of the item of $10,383, representing a city tax and, which by stipulation is no longer in controversy (R. 40), and another small item, never in issue, all the other capital expenditures incurred by the taxpayer in connection with the property—totalling less than $24,000 in all—had been fully depreciated prior to the taxable years here involved (R. 38).

Consequently, the taxpayer's basis depends solely upon the cost to it of the property. Since the property was acquired on May 1, 1913, for stocks and bonds, the taxpayer's cost is the value of these securities at the time. These securities consisted of bonds, secured by a first deed of trust on the property, with a face value of $300,000 and the taxpayer's

of which it can never be deprived, in a basis of $860,000. This means not only that the taxpayer is entitled to recover the taxes for the years in-

entire authorized capital stock, six thousand shares with a face value of $300,000. (R. 86.) The bonds, it was conceded, had the value shown on their face, $300,000; the only issue is as to the value of the stock. In the trial court, the Government showed by sales and by contemporaneous records reflecting the value placed on the stock that, its fair market value in 1913 did not exceed $108,000, or $18.00 a share. Among other things it was shown that the company which acquired the stock in 1913 valued it on its books at $100,000, or approximately $16.67 per share, and took an immediate loss of $24,525 on the basis of this value (R. 175, 181–182); that offering the stock at $18.00 a share, it was able to sell fewer than five hundred shares between 1913 and 1920 (R. 167–168, 182); and that in 1920 it sold the balance to their present owner for approximately $13.67 per share (R. 44, 167, 182). The trial court found as a fact that the taxpayer placed a maximum value on its own stock, as of May 1, 1913, of $18.00 per share. (R. 187.)

The taxpayer, to show the value of its stock, relied exclusively on opinion evidence by two real estate experts as to the value of the property at the time it was acquired by the taxpayer. (R. 103–106, 106–107.) Equating the highest value they placed on the property in 1913, $850,000 (R. 103), with the securities given for it, yields a value for the taxpayer's stock of approximately $90.00 per share, or roughly five times the price at which they were sold—with difficulty—at the time. As the district court pointed out, the only explanation of this wide variance is "an error in the judgment" of the taxpayer's witnesses. (R. 183.)

It is clear from the record, therefore, that the cost of the property to the taxpayer did not exceed $408,000, $108,000 in stock and $300,000 in bonds. Accordingly, the Commissioner's determination, sustained by both courts below, that the taxpayer's basis in its property did not exceed $430,000 (a figure arrived at by him without knowledge of the sales price of the taxpayer's stock, but on the basis of other infor-

volved in this action, but also that no taxes need be paid on future income equal in amount to the fictional basis of $860,000 created by the estoppel, minus depreciation already taken. In other words, $430,000 in income, the difference between the actual basis and the fictional basis, minus depreciation already allowed, is made tax-free.

It is respectfully submitted that the decision below, which is so upsetting to the practical every-day administration of the tax program, rests upon a misunderstanding of the scope of the doctrine of collateral estoppel. The court below stated the controlling question before it to be whether "consent decrees will support a plea of res judicata." (R. 223.) Having concluded that such decrees would, it held that the decisions entered by the Tax Court in the prior proceedings made the taxpayer's basis *res judicata*. It did so on the ground that "the ultimate facts for determination" in this action were identical with those in the prior proceedings, stating that "Of course, if consent decrees are to be given effect as res judicata it must follow that the similarity of the ultimate fact or issue is alone necessary, since very frequently consent decrees and judgments are entered on stipulation without a recitation of the facts upon which the agreement was reached." (R. 214.)

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mation (R. 43–44)) is clearly correct and, if anything, overgenerous.

This is correct as to the precise cause of action adjudicated by a consent judgment, but in this case that cause of action related only to respondent's tax liability for the years for which the settlement was made. In so far as the court below concluded that consent decrees of the character here involved, based solely upon the agreement of the parties and not involving any inquiry into or determination by the court of any legal or factual issue, will sustain a plea of estoppel for subsequent tax years, it is in square conflict with the Court of Appeals for the Tenth Circuit. *Trapp* v. *United States*, 177 F. 2d 1, certiorari denied, 339 U. S. 913. Its treatment of these decrees as making *res judicata* issues raised by the pleadings which would have been determined by the court, had the matter proceeded to judgment on the merits, but which were not in fact so determined because of the settlement between the parties, cannot be reconciled with decisions by the Courts of Appeals for the First, Second and Fourth Circuits. *Pelham Hall Co.* v. *Hassett*, 147 F. 2d 63 (C. A. 1); *Hartford-Empire Co.* v. *Commissioner*, 137 F. 2d 540 (C. A. 2), certiorari denied, 320 U. S. 787; *Stanback* v. *Robertson*, 183 F. 2d 889 (C. A. 4), certiorari denied, 340 U. S. 904.[9] The latter cases follow

[9] In the *Hartford-Empire case*, Judge Learned Hand said: "How far a decision upon a question of law can be an estoppel in a later action upon a different cause of action is a vexed question, but no one has ever suggested that it can extend to matters not actually litigated." (137 F. 2d at 542.)

principles applied by this Court in more than a score of cases, including *Cromwell* v. *County of Sac*, 94 U. S. 351; *Commissioner* v. *Sunnen*, 333 U. S. 591, and *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620.

A. DECISIONS OF THE TAX COURT ENTERED UPON STIPULATIONS OF "NO DEFICIENCY" WILL NOT SUPPORT A PLEA OF ESTOPPEL

Contrary to the decision below, the Court of Appeals for the Tenth Circuit has held that a decision of the Tax Court of the character here involved, "not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right" and "will not support a plea of estoppel." *Trapp* v. *United States*, *supra*, p. 5. The decisions of the Tax Court have been uniformly to the same effect. *Volunteer State Life Insurance Co.* v. *Commissioner*, 35 B. T. A. 491, 494–495, reversed on other grounds, 110 F. 2d 879 (C. A. 6), certiorari denied, 310 U. S. 636; *Riter* v. *Commissioner*, 3 T. C. 301, 305; *Pitcairn* v. *Commissioner*, decided May 22, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,185); *Laughlin* v. *Commissioner*, decided October 3, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,317); cf. *Wayne Body Corp.* v. *Commissioner*, 22 B. T. A. 401; *Stanley Co. of America* v. *Commissioner*,

26 B. T. A. 705; *Keener Oil & Gas Co.* v. *Commissioner,* 32 B. T. A. 186.

Since the doctrine of collateral estoppel is intended to preclude relitigation of points which have already been contested and decided, the decisive question is, not whether the decree was one entered by consent of the parties, but whether it is, on the one hand, a mere authentication, or recording, of the agreement of the parties or, on the other, a judicial determination of litigated issues. Admittedly, a judgment may rest upon a judicial determination on the merits even where the defendant has defaulted (*Last Chance Min. Co.* v. *Tyler Min. Co.,* 157 U. S. 683) or has consented to judgment (Cf. *Harding* v. *Harding,* 198 U. S. 317; *Swift & Co.* v. *United States,* 276 U. S. 311; *United States* v. *Radio Corp. of America,* 46 F. Supp. 654 (D. Del.), appeal dismissed, 318 U. S. 796). However, it is clear that each of the decisions here involved was, in the language of the Tax Court, in a similar case, merely a *pro forma* acceptance of "an agreement of the parties to settle their * * * controversy for undisclosed reasons satisfactory to themselves." (*Riter* v. *Commissioner, supra,* p. 305) and rested upon no independent judicial determination by the court. This Court in a parallel, but different, context has indicated that such decrees are essentially in the nature of judicially recorded agreements of the parties. *Gay* v. *Parpart,* 106 U. S. 679; *Law-*

rence Mfg. Co. v. *Jonesville Cotton Mills*, 138 U. S. 552.

In none of the cases cited by the court below in which an estoppel was based upon a consent decree was the decree, as here, a naked decision in favor of one party, involving no inquiry into the facts, no examination of the issues and no determination either of fact or law, being based solely upon the agreement of the parties.[10] Clearly, none of the considerations of policy underlying the doctrine of collateral estoppel, economy of

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[10] Only four of the cases cited by the court below clearly involve the doctrine of collateral estoppel. *Utah Power & Light Co.* v. *United States*, 42 F. 2d 304 (C. Cls.); *O'Cedar Corp.* v. *F. W. Woolworth Co.*, 66 F. 2d 363 (C. A. 7); *Warner* v. *Tennessee Products Corp.*, 57 F. 2d 642 (C. A. 6), certiorari denied, 287 U. S. 632; *Roberts Cone Mfg. Co.* v. *Bruckman*, 266 Fed. 986 (C. A. 8), certiorari denied, 254 U. S. 649. In each of these cases the issue sought to be concluded in the second suit had been specifically adjudicated by the judgment in the first suit and language to that effect had been included in the decree. Moreover, it was so clear that the first suit had been intended to put beyond question the very issue sought to be relitigated in the second, that not to apply an estoppel would clearly have been to permit repetitious law suits. In the other cases cited by the court below there was either no question of collateral estoppel (*Swift & Co.* v. *United States*, 276 U. S. 311; *United States* v. *Radio Corp. of America*, 46 F. Supp. 654 (D. Del.), appeal dismissed, 318 U. S. 796; *Woods Bros. Const. Co.* v. *Yankton County, S. D.*, 54 F. 2d 304 (C. A. 8)) or the second action was so closely related to the first as to make *res judicata* in its strict sense, rather than collateral estoppel, applicable. In two of the cases cited by the court below the second action was on the same cause of action as the first (*Continental Petro-*

judicial time and prevention of repetitious litigation, *Commissioner* v. *Sunnen*, 333 U. S. 591, 599, has any application to such a decree. Consequently, the plea of estoppel should not bar a court, where there has been no previous judicial determination of the merits, from making such a determination. That the parties were willing in connection with one cause of action to forego such a determination should not bind them in subsequent causes. Otherwise, the doctrine of collateral estoppel becomes a device by which a decision not on the merits can forever foreclose inquiry into such merits. For these reasons the court below should have rejected, as did the Court of Appeals for the Tenth Circuit, the plea of estoppel, based on a decision of the Tax Court, not on the merits, but entered solely to dispose of the case in accordance with the agreement of the parties. Cf. *Freuhauf Trailer Co.* v. *Gilmore*, 167 F. 2d 324 (C. A. 10); *Cutter* v. *Arling-*

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leum Co. v. *United States*, 87 F. 2d 91 (C. A. 10), certiorari denied, 300 U. S. 679; *Snell* v. *J. C. Turner Lumber Co.*, 285 Fed. 356 (C. A. 2), certiorari denied, 261 U. S. 616), in which case there is, of course, no question that *res judicata* is an absolute bar (*United States* v. *Parker*, 120 U. S. 89; *Nashville, &c., Railway Co.* v. *United States*, 113 U. S. 261). In a third, the second suit was so clearly embraced within the first action as to make *res judicata* applicable (*Rector* v. *Suncrest Lumber Co.*, 52 F. 2d 946 (C. A. 4)); and in another the second suit was in execution of the first, in which case, also, the former decree is admittedly conclusive (*Ingraham Co.* v. *Germanow*, 4 F. 2d 1002 (C. A. 2)).

ton Casket Co., 255 Mass. 52; *Jenkins* v. *Robertson*, 1 Sc. & Div. App. 117; Restatement of the Law of Judgments, Sec. 68.[11]

B. THE CENTRAL ISSUE IN THIS ACTION, THE TAXPAYER'S BASIS IN ITS PROPERTY, WAS NOT LITIGATED OR DETERMINED IN THE PRIOR PROCEEDINGS

Even if it be assumed that decrees of the Tax Court of the character here involved can in some possible circumstances form the basis for a plea

[11] Section 68 of the Restatement of the Law of Judgments states: "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

Comment *i* to that section deals with its application to judgments by confession:

> Where no issues are litigated between the parties, but the defendant confesses judgment, the judgment is not binding on the parties in subsequent actions based on a different cause of action. * * *

Comment *f* states:

> If in the original action the defendant fails to deny a material allegation contained in the plaintiff's complaint, he thereby admits the truth of the allegation for the purposes of that action, and if judgment is given for the plaintiff the defendant cannot attack it by showing that the plaintiff's allegation was not true. But in a subsequent action based on a different cause of action he is not precluded from denying the truth of the allegations of the plaintiff's complaint in the original cause of action.

Comment *d* reads:

> A judgment on one cause of action is not conclusive in a subsequent action based upon a different cause of action as to questions of fact which might have been but were not litigated and determined in the prior action. The

of estoppel, there could be no estoppel here as to the taxpayer's basis in its property since the record does not establish that this issue was either litigated or determined in the proceedings involving the prior tax years.

It is fundamental that "where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action * * *. Only upon such matters is the judgment conclusive in another action." *Cromwell* v. *County of Sac*, 94 U. S. 351, 353; *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 625–626; *Mercoid Corp.* v. *Mid-Continent Coal*, 320 U. S. 661, 671; *Davis* v. *Brown*, 94 U. S. 423; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 401. And to sustain the plea it must be shown either by the record or by extrinsic evidence that the

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failure of the defendant to interpose a defense in the prior action which resulted in a judgment against him precludes him, it is true, from relying upon that defense thereafter in so far as the same cause of action is concerned. As to that cause of action the judgment is conclusive as to all defenses which the defendant interposed or might have interposed (*see* § 47). The result is different, however, as to the effect of the judgment upon other causes of action. The defendant is not precluded from interposing a defense to the subsequent action

particular controversy sought to be concluded was involved and determined in the former suit. *Russel* v. *Place*, 94 U. S. 606, 608; *Packet Co.* v. *Sickles*, 5 Wall. 580; *Oklahoma* v. *Texas*, 256 U. S. 70, 88; *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569; *Sealfon* v. *United States*, 332 U. S. 575, 578.

This principle has been repeatedly applied in tax cases. Thus, the Court of Appeals for the First Circuit refused to find that a decision of the Board of Tax Appeals made the basis for depreciation of property held by the taxpayer *res judicata* in litigation involving subsequent tax years because the issue relied on by the taxpayer in the later proceeding had not been contested or

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which he might have interposed but did not interpose in the first action.

Although it is not unfair to the losing party to hold that any question of fact actually determined in the action shall be conclusive against him in a subsequent action between the parties based upon a different cause of action, it would be unfair to him to hold that he is precluded from relying upon facts which might have been but were not determined in the prior action. If the defendant fails to interpose a defense in the prior action and judgment is given against him, the original cause of action is merged in the judgment; but there is no reason why he should not make the defense when sued upon a different cause of action. He may have various reasons for not interposing the defense in the first action and for permitting the plaintiff to obtain a judgment against him in that action. It may be that the action involves so small an amount that a defense to the action would cost him more than he would lose by failing to defend.

decided in the earlier action. In the earlier proceeding, both sides had assumed that the proper basis for depreciation was the cost of the building to the taxpayer; in the later proceeding, the taxpayer urged that the proper basis was the cost to its predecessor because the taxpayer had acquired the building in a tax-free organization. *Pelham Hall Co.* v. *Hassett*, 147 F. 2d 63.

The Court of Appeals for the Second Circuit, after observing that an estoppel by judgment "depends upon whether the actual point was decided and was necessary to the decision", held that the Commissioner was not estopped from questioning the basis for depreciation of certain patents owned by the taxpayer by a decision of the Tax Court assessing deficiencies for earlier years. It reached this conclusion because the Commissioner had conceded in the earlier actions that the basis for depreciation was the cost of the patents to the taxpayer and he was contending in the second suit that the correct basis was their cost to the taxpayer's assignors, a question not previously litigated. *Hartford-Empire Co.* v. *Commissioner*, 137 F. 2d 540, 541, certiorari denied, 320 U. S. 787.

In similar circumstances, the Court of Appeals for the Fourth Circuit held that the doctrine of collateral estoppel could not be invoked to prevent inquiry into the validity of a partnership for income tax purposes since in the prior pro-

ceeding in the Tax Court, upon which it was sought to base the estoppel, involving the same parties and the same facts, that issue had not been litigated. *Stanback* v. *Robertson*, 183 F. 2d 889, certiorari denied, 340 U. S. 904.[12]

See also *Argo* v. *Commissioner*, 150 F. 2d 67 (C. A. 5), certiorari denied, 326 U. S. 762; *Travelers Ins. Co.* v. *Commissioner*, 161 F. 2d 93 (C. A. 2), certiorari denied, 332 U. S. 766; *Commissioner* v. *Texas-Empire Pipe Line Co.*, 176 F. 2d 523 (C. A. 10); *Blaffer* v. *Commissioner*, 134 F. 2d 389 (C. A. 5); *Burford-Toothaker Tractor Co.* v. *Commissioner*, 192 F. 2d 633 (C. A. 5), certiorari denied, 343 U. S. 941; *Cory* v. *Commissioner*, 159 F. 2d 391 (C. A. 3); *Gillespie* v. *Commissioner*, 151 F. 2d 903 (C. A. 10), certiorari denied, 328 U. S. 839.

In the present case it is clear that the only issues determined by the Tax Court in the prior actions were that there were no deficiencies in

[12] It may be suggested that *Pelham Hall Co.* v. *Hassett*, *supra*, *Hartford-Empire Co.* v. *Commissioner*, *supra*, and *Stanback* v. *Robertson*, *supra*, are distinguishable because the issue not previously litigated in each was one of law. The essential fact, however, is that the court permitted in each case relitigation of the ultimate fact determined in the prior proceeding, which in two of the three cases was the same issue as is here involved, the taxpayer's basis for depreciation, because one of the premises upon which it rested had not been litigated. In this case, neither the ultimate fact, the basis for depreciation of the taxpayer's property, nor any of the underlying facts were either litigated or determined. *A fortiori*, there can be no estoppel here.

the taxpayer's income taxes for 1933, 1938 and 1939, and that the assessments previously made against it for those years were abated. Every other issue was removed from the case by the agreement of the parties. There can be no estoppel as to the taxpayer's basis for depreciation since this issue was not presented to, or considered and resolved by, the Tax Court.

Implicit in the opinion of the court below is the assumption that the taxpayer's petitions in the prior proceedings defined the questions raised and determined there. That might be true if the judgments had been rendered on the pleadings because of the default of the defendant. But cf. footnote 11, *supra*. However, the judgments rested not on the pleadings but on the agreement of the parties. The decisions entered by the Tax Court recited simply (R. 52, 54) that they were entered "[u]nder written stipulation signed by counsel for the parties" in the proceedings; no reference was made to the pleadings, and there is no indication that Judge Murdock, who signed the orders, even had the pleadings before him at the time. The specific issues raised by the pleadings were not submitted to the Tax Court for determination, and they were not determined, either in fact or in law, by the court's formal orders. Nor is there any evidence that there was an agreement upon these issues by the parties. The opinion of the court below rests upon the mistaken assumption that there was such an agree-

ment. The court below assumed that the "ultimate fact" for determination in the prior proceedings was the taxpayer's basis in its property; that the parties agreed upon this basis because they agreed to a decision of no deficiency; and that they are therefore concluded by the judgment entered upon their agreement. But there is nothing whatsoever in the record to support the conclusion of the court below that the parties had "threshed out the facts" and "agreed upon the basis for depreciation." (R. 223.)

In so far as extrinsic evidence throws any light upon the Commissioner's reasons for entering in the stipulations, it negatives the idea that he accepted the taxpayer's contention as to the merits of any of the issues in dispute. The record shows that four days before the stipulations for the Tax Court's decisions was executed, the Collector and the taxpayer had withdrawn by stipulation the Government's claim in the bankruptcy court for the taxes in question. This stipulation recites that it is (R. 51)—

> without prejudice and does not constitute a determination of the merits and does not prejudice the rights or remedies of the United States for the collection of Internal Revenue taxes that may be due with respect to any year other than those involved * * *.

The fact that these restrictions were not incorporated in the briefer stipulations filed in the Tax Court was undoubtedly due to the fact that

the latter were in a form which the Bureau of Internal Revenue had always assumed, and the Tax Court had held, carried these restrictions with it, by operation of law.

All that the record shows is that the Commissioner, for reasons which are not disclosed, elected not to contest the two earlier proceedings. Obviously, many considerations other than the merits may have entered into this decision. The amount of money involved was small and the taxpayer was in reorganization. The Commissioner must utilize limited personnel and funds in the most productive way. Not every case can be litigated; some selection must be made. As this Court pointed out in *Cromwell* v. *County of Sac*, 94 U. S. 351, 356, many considerations "may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time." These considerations and others [13] affect the Government as a litigant, as well as private parties. In view of the variety of reasons which may have

[13] Among the reasons, apart from the merits of the particular case, which commonly lead to stipulated decisions, the following may be noted: (1) Discovery of adjustments on issues other than those originally in dispute between the taxpayer and the Commissioner which result in elimination of the asserted deficiency; (2) discovery of procedural defects or irregularities in the Commissioner's deficiency determination for the particular year or years involved.

led the Commissioner not to continue the controversy, there is no basis for concluding that his decision was based on acquiescence in the merits of the taxpayer's claim.

In any event, it is clear that, whatever reasons led the Commissioner to agree to the decisions entered by the Tax Court, the only issues which those decisions determined, in view of the record upon which they rest, was that nothing was owing from the taxpayer for the years 1937, 1938 and 1939. Consequently, those decisions should not now preclude the Commissioner from litigating the issue as to the basis to the taxpayer of its leasehold, since this question was not, even though it might have been, "actually presented and determined in the first suit." *Commissioner* v. *Sunnen*, 333 U. S. 591, 598.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

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MARCH 1953.

APPENDIX A

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(l) [As amended by Sec. 121 (c), Revenue Act of 1942, c. 619, 56 Stat. 798.] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

(s) [As added by Sec. 211 (a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property, except that—

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the

sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) [As amended by Sec. 130 (b), Revenue Act of 1942, *supra.*] *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges * * * for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

(B) In respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this chapter or prior income tax laws. * * *

* * * * * *

(26 U. S. C. 1946 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION:

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * * *

(26 U. S. C. 1946 ed., Sec. 114.)

SEC. 122. [As added by Sec. 211 (b), Revenue Act of 1939, *supra.*] NET OPERATING LOSS DEDUCTION.

(a) [As amended by Sec. 105 (e) (3) (A), Revenue Act of 1942 *supra.*] *Defini-*

tion of Net Operating Loss.—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [As amended by Sec. 153 (a), Revenue Act of 1942, *supra.*] *Amount of Carry-Back and Carry-Over.*—

* * * * *

(2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 122.)

SEC. 718. [As added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 218, Revenue Act of 1942, *supra.*] EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

(1) *Money paid in.*—Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

(2) *Property paid in.*—Property (other than money) previously paid in regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange. If the property was disposed of before such taxable year, such basis shall be de-

termined under the law applicable to the year of disposition, but without regard to the value of the property as of March 1, 1913. If the property was disposed of before March 1, 1913, its basis shall be considered to be its fair market value at the time paid in. If the unadjusted basis of the property is a substituted basis, such basis shall be adjusted, with respect to the period before the property was paid in, by an amount equal to the adjustments proper under section 115 (l) for determining earnings and profits;

* * * * * * *

(26 U. S. C. 1946 ed., Sec. 718.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (l)–1. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, or treated under section 29.23 (a)–15 as held by the taxpayer for the production of income, may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property determined in accordance with section 113. * * *

Treasury Regulations 112, promulgated under the Internal Revenue Code:

SEC. 35.718–1. DETERMINATION OF DAILY EQUITY INVESTED CAPITAL.—MONEY AND PROPERTY PAID IN.—The equity invested capital for any day is determined as of the beginning of such day. The basis or starting point is found in the amount of money and property previously paid in for stock, or as paid-in surplus, or as a contribution to capital. The terms "money paid in" and "property paid in" do not include amounts received as premiums by an insurance company subject to taxation under section 204. For the purpose of determining equity invested capital, the amount of any property paid in is the unadjusted basis to the taxpayer for determining loss upon a sale or exchange under the law applicable to the taxable year for which the invested capital is being computed.

* * * * *

If the basis to the taxpayer is cost and stock was issued for the property, the cost is the fair market value of such stock at the time of its issuance. If the stock had no established market value at the time of the exchange, the fair market value of the assets of the company at that time should be determined and the liabilities deducted. The resulting net worth will be deemed to represent the total value of the outstanding stock. In determining net worth for the purpose of fixing the fair market value of the stock at the time of the exchange, the property paid in for such stock shall be included in the assets at its fair market value at that time.

U. S. GOVERNMENT PRINTING OFFICE: 1933

THE TAX COURT OF THE UNITED STATES
WASHINGTON

Petitioner,	
v.	Docket No.
COMMISSIONER OF INTERNAL REVENUE, Respondent.	

DECISION

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on

it is

ORDERED and DECIDED:

Enter:

Judge.

OPC 16—81695-1

Form No. 527
Revised Oct. 1942